Nos. 98-1716 & 98-1718

Supreme Court, U.S.
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In The

Supreme Court of the United States

PENNY KOTTERMAN, *et al.*,

Petitioners,

v.

MARK W. KILLIAN, *et al.*,

Respondents.

LOUIS RHODES,

Petitioner,

v.

MARK W. KILLIAN, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

RESPONDENT ARIZONA DEPARTMENT OF REVENUE'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a state law allowing an income tax credit for contributions to organizations that provide scholarships to secular and sectarian private schools violate the Establishment Clause of the First Amendment to the United States Constitution?

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INTRODUCTORY STATEMENT

Arizona has adopted a unique tax credit program to encourage contributions to nonprofit organizations that provide scholarships to students attending private schools. This program involves neutral tax benefits with only attenuated effects on the private schools. The connection between the State and the schools exists only because of independent decisions made by the taxpayers contributing the funds, the nonprofit organization providing the scholarships, and the parents who choose a school. The program does not endorse any particular religion, or religion over nonreligion, and does not coerce any person to participate in any religious activities.

The Arizona Supreme Court rejected Petitioners' challenge to the tax credit program under the Establishment Clause and several provisions of the Arizona Constitution. The court's exhaustive opinion is consistent with this Court's analysis of the Establishment Clause and creates no conflict with a decision either of another state court of last resort or of a United States Court of Appeals. Further review is unnecessary. Consequently, Respondent Arizona Department of Revenue through its Director, Mark W. Killian (hereinafter the "Department"), opposes the Petitions for Writ of Certiorari.[1]

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[1] Petitioners Penny Kotterman, Pantilo Contreras, Frieda Baker, Rev. Dr. Gerald S. DeGrow, Joanne Hilde, Michael J. Hogendyle, Pastor Stanley Jones, Jann Renert, James Ullman, and Rabbi Weizenbaum filed a Petition for Certiorari, No. 98-1716 (hereinafter "Kotterman Pet."). Petitioner Louis Rhodes

STATEMENT OF THE CASE

A. The School Tuition Organization Tax Credit

In 1997, Arizona enacted the School Tuition Organization Tax Credit, providing a tax credit for contributions to a School Tuition Organization that gives scholarships or tuition grants to children attending nongovernmental primary and secondary schools. 1997 Ariz. Sess. Laws, Ch. 48, codified as Arizona Revised Statutes Annotated ("A.R.S.") § 43-1089.[2] This legislation also provides a tax credit for fees paid to a public school for the support of extracurricular activities. A.R.S. § 43-1089.01.[3]

The School Tuition Organization Tax Credit is not available for contributions to private schools, but only for contributions to a charitable organization that is exempt from federal taxation under section 501(c)(3) of the Internal Revenue Code ("IRC") and allocates at least ninety

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filed a separate Petition for Certiorari, No. 98-1718 (hereinafter "Rhodes Pet."). The only difference between the issues raised in the respective Petitions is Petitioner Rhodes' second issue concerning the use of "public funds," which will be addressed in Argument III *infra*.

[2] Arizona Revised Statutes Annotated § 43-1089 is set forth in the Kotterman Petition at 2-3 and the Rhodes Petition at 1-3.

[3] A public school cannot charge fees for basic instruction. *See* ARIZ. CONST. art. XI, § 6; Ariz. Att'y Gen. Op. I94-004 (Ariz. 1994). While A.R.S. § 43-1089.01, which authorizes up to a $200 credit for public school support, refers to a credit for fees paid for extracurricular activities, the Department has interpreted and applied the statute to allow a tax credit to any taxpayer who contributes to a public school for support of extracurricular activities. Ariz. Dep't of Revenue Publication 707 (1998).

per cent of its annual revenue for educational scholarships or tuition grants and does not limit availability only to students of one school. A.R.S. § 43-1089(E)(2). To qualify as a 501(c)(3) organization, the School Tuition Organization must comply with stringent requirements, and inform the Internal Revenue Service ("IRS") about its criteria for selecting scholarship recipients, rules of eligibility, how and by whom the recipients will be selected, and provide the IRS with a copy of the scholarship application form and any brochures or literature describing the scholarship program. *See* IRS Publication 557 at 19 (May 1997). The credit is in lieu of any Arizona income tax deduction, and no credit is allowed if the taxpayer designates the donation for the direct benefit of any dependent of the taxpayer. *See* A.R.S. § 43-1089(C) and (D). Scholarships and tuition grants must allow students to attend "qualified schools," which must be nongovernmental primary and secondary schools that do not discriminate on the basis of race, color, handicap, familial status or national origin, and that satisfy the requirements prescribed by law for private schools in Arizona. *See* A.R.S. § 43-1089 (E)(1); *see also* A.R.S. § 15-802 (prescribing, *inter alia*, that students be provided instruction in at least reading, grammar, mathematics, social studies, and science).

The direct beneficiaries of the School Tuition Organization Tax Credit are the individual taxpayers who choose to donate their personal funds to the organization. Indirect benefits also accrue to the School Tuition Organizations and the children who receive scholarships or tuition grants. While these scholarships and grants may be paid to qualifying schools, there is no evidence in the

record that these schools will receive more funds than they would have otherwise received, or that the schools will be relieved of any costs that they already incur.[4]

The School Tuition Organization Tax Credit, which reduces the tax burdens of those who contribute their personal funds to further the education of Arizona's children, is consistent with Arizona's legislative policy of promoting a variety of educational opportunities for children. Other Arizona legislation that provides parents with an increased ability to choose the best education to meet his or her child's needs includes legislation requiring school districts to allow students who live outside of the district to enroll in the district's schools without paying tuition, A.R.S. § 15-816.01, and legislation authorizing charter schools to receive public funds and prohibiting charter schools from charging tuition, A.R.S. §§ 15-181 to 189.02. *See also* A.R.S. § 15-181(A) (The purpose of charter schools is to provide both a learning environment that will improve pupil achievement and additional academic choices for parents). Like open enrollment and charter schools, the School Tuition Organization Tax Credit fosters a greater range of academic choices for Arizona's parents and children.

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[4] Petitioner Rhodes argues that information reported to the Department shows the majority of the scholarships and tuition grants are to children attending sectarian schools. Rhodes Pet. at 5 n.4. This information does not reflect complete reporting by all organizations and was not part of the record before the lower court, which considered only a facial challenge to the constitutionality of the tax credit. Moreover, it does not show that the schools received any more funds than they would have otherwise received from students paying tuition.

The School Tuition Organization Tax Credit is also consistent with Arizona and federal law that provides tax benefits for contributions to charitable organizations that award scholarships to students who attend private schools. *See* IRC § 170 (deductions for charitable contributions); A.R.S. § 43-1042 (adopting federal deductions for Arizona income tax purposes). With a top federal marginal tax rate of 39.6% (*see* IRC § 1) and a top Arizona marginal tax rate of 5.17% (*see* A.R.S. § 43-1011), the total tax savings for a $500 tax *deduction* would be approximately $224 (44.77%). The School Tuition Organization Tax Credit merely expands the current benefits available under the tax code, so that instead of a benefit under state and federal law of up to $224, a taxpayer who contributes personal funds to a School Tuition Organization can obtain up to a $500 tax benefit.[5]

Moreover, providing a tax credit rather than a tax deduction is not new to tax law. Tax credits have been a fixture of Arizona and federal income tax since income taxes were first enacted. Arizona law currently contains four dollar-for-dollar credits: A.R.S. §§ 43-1089 (up to $500 for contributions to school tuition organizations); 43-1089.01 (up to $200 for public school extracurricular activities); 43-1088 (up to $200 for contributions to charitable organizations that provide assistance to the working poor); and 16-954 (enacted as Proposition 200 in the 1998

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[5] Contrary to Petitioner Rhodes' assertion, Rhodes Pet. 4 n.3, taxpayers will not profit from making the contribution. While some taxpayers may be able to claim a charitable deduction on their federal return for the contribution under IRC § 170, claiming the credit will correspondingly reduce their state income tax deduction under IRC § 164.

general election, allowing a credit of the greater of $500 or 20% of the tax amount for contributions to the Clean Elections Fund). Numerous partial credits are also available to taxpayers. *See* A.R.S. §§ 43-1071 to 1090; *see also* Kotterman Pet. 13 n.4. Similarly, Congress has allowed numerous tax credits to be applied against federal income tax liability in the Internal Revenue Code. *See* IRC §§ 21 to 52.

B. Procedural Background

Shortly after the enactment of the School Tuition Organization Tax Credit, Petitioners, eleven Arizona citizens and taxpayers, filed a Petition for Special Action directly in the Arizona Supreme Court challenging the constitutionality of the credit under the federal Establishment Clause and the Arizona Constitution.[6] The Special Action sought an order enjoining Respondent Mark W. Killian, in his official capacity as Director of the Department, from implementing the credit.

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[6] In Arizona, a Special Action is a form of relief that replaces the common law writs of certiorari, mandamus, and prohibition, and is available where there is no equally plain, speedy, and adequate remedy by appeal. *See* Ariz.R.Proc.Sp.A. 1. All parties agreed that the Arizona Supreme Court should accept jurisdiction of the Special Action in the hopes that the constitutionality of the tax credit could be determined before the tax credit became fully effective in 1998. The record before the Arizona Supreme Court consisted only of documents and affidavits included as exhibits to the pleadings. *See* Ariz.R.Proc.Sp.A. 7(e).

A majority of the Arizona court sustained the tax credit under both the Arizona and federal constitutions. Kotterman Pet. 2a-40a; Rhodes Pet. A3-A45. The court held that the tax credit had a secular purpose, did not foster excessive governmental entanglement with religion, did not have the primary effect of furthering religion, and did not endorse religion or coerce anyone into participating in religious activities. Kotterman Pet. 4a-19a; Rhodes Pet. A3-A21. The court also found no violation of the Arizona constitution because there was no appropriation of public money or property for private schools or for religious worship or instruction. Kotterman Pet. 19a-40a; Rhodes Pet. A21-A45.

Two justices dissented, disagreeing with the majority's interpretation of the Arizona constitution. Kotterman Pet. 53a-85a; Rhodes Pet. A60-A96. The dissenters did not disagree with the majority that the tax credit has a secular purpose and does not involve excessive entanglement between religion and government, but concluded that the primary effect of the tax credit is to advance sectarian aims of nonpublic schools and that it therefore violated the Establishment Clause. Kotterman Pet. 43a-53a; Rhodes Pet. A48-A59.

THE COURT SHOULD DENY THE PETITIONS.

There is no compelling reason for this Court to review the Arizona Supreme Court's decision in this case. First, the Petitions do not present a novel federal question because the lower court correctly applied this Court's holdings in *Mueller v. Allen*, 463 U.S. 388 (1983), and

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), to uphold the unique Arizona tax credit in this case. Second, there is no conflict between the Arizona decision and either a decision of a state court of last resort or a United States Court of Appeals. The tax credit in dispute exists only in Arizona and no other court in the nation has addressed the application of the Establishment Clause to the issue decided by the Arizona Supreme Court. Consequently, none of the reasons this Court has included in its rules as justifying review are present here. *See* Supreme Court Rule 10.

I. THE ARIZONA DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENTS.

Applying the three-part test used by this Court in some Establishment Clause cases, *see Lemon v. Kurtzman*, 403 U.S. 602 (1971), the lower court found the Arizona law to be valid under each of the three parts.[7] In reaching its conclusions, the court relied extensively on this Court's holding in *Mueller* as well as the Court's more recent Establishment Clause decisions that recognize that not all government aid to the educational function of religious schools is invalid. *See Agostini v. Felton*, 521 U.S. 203, 225 (1997). The lower court correctly concluded that

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[7] Under *Lemon* a law must (1) have a secular purpose, (2) have a primary effect that does not advance religion, and (3) not create excessive entanglement between government and religion. *Lemon*, 403 U.S. at 612-13. While the *Lemon* test is often applied, this Court has also "emphasized that it provides 'no more than [a] helpful signpos[t]' in dealing with Establishment Clause challenges." *Mueller*, 463 U.S. at 394 (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)).

the Arizona tax credit is constitutional under this Court's precedents.

A. There Is No Constitutional Distinction Between the Tax Deduction Upheld in *Mueller* and the Tax Credit at Issue Here.

In *Mueller*, the Court upheld a Minnesota statute that allowed state taxpayers to deduct actual expenses incurred for the tuition, textbooks, and transportation of dependents attending elementary or secondary school. *Mueller*, 463 U.S. at 391. The Court found several features of the Minnesota tax deduction in *Mueller* particularly significant in concluding that the legislation's principal or primary effect was one that neither advanced nor inhibited religion. *Mueller*, 463 U.S. at 396-402. Those factors include (1) the Court's recognition that legislatures traditionally are given especially broad latitude in creating classifications and distinctions in tax statutes and that therefore the Minnesota legislature's judgment that a deduction for educational expenses fairly equalizes the tax burdens of its citizens and encourages desirable expenditures for educational purposes was entitled to substantial deference; (2) the deduction was only one among many deductions allowed under Minnesota income tax law; (3) the deduction was available for educational expenses incurred by all parents, including those whose children attend public schools and those whose children attend nonsectarian or sectarian private schools; (4) the aid went to parents of school children rather than directly to the schools and therefore the financial benefits resulting to parochial schools was attenuated; and (5) the benefits of the law can be fairly regarded as a rough

return for the benefits provided to the State and all taxpayers by parents sending their children to parochial schools. *Id.*

Arizona's tax credit is similar to the Minnesota tax deduction with respect to the factors that the Court found significant in *Mueller*. The Arizona Legislature's determination that a credit for donations to charitable organizations that award scholarships to students who attend private schools will encourage desirable expenditures to support education is entitled to substantial deference. Further, the tax credit here is one among numerous tax credits that exist in the Arizona income tax law, including the new one for fees and contributions paid to public schools. *See* A.R.S. §§ 43-1071 to 1090. In addition, the Arizona tax credit is merely an expansion of a tax deduction for charitable contributions which traditionally exists in the law. Tax benefits to parents for payment of school tuition are rare, but tax benefits for contributions to charitable organizations that grant scholarships are the general rule. *See* IRC § 170. Moreover, the Arizona law is even further removed from sectarian schools than was the direct benefit to parents upheld in *Mueller*. Under A.R.S. § 43-1089, the aid does not go to the schools, but to a qualified School Tuition Organization that makes grants to children. The financial benefit to the schools is attenuated, and, indeed, is totally speculative. Thus, Arizona's tax credit, which goes to a charitable organization instead of to parents for payment of school tuition is entitled to greater deference than the tax deduction upheld in *Mueller*. Finally, just as in *Mueller*, the benefits of the law can be regarded as a rough return for the benefits provided by private taxpayers, who, in this case, donate their

own funds to aid children other than their own to attend private schools.

Petitioners argue that because Arizona allows a tax credit rather than a deduction it is not "part[ ] of a genuine system of tax laws." Kotterman Pet. at 12 (quoting *Mueller*, 463 U.S. at 396 n.6). To the contrary, the School Tuition Organization Tax Credit is consistent with Arizona's other tax credits including a credit for fees paid for extracurricular expenses and with the tax deductions for charitable contributions. Moreover, the difference between a deduction and a credit cannot be of constitutional significance because deductions and credits are simply different ways to reduce taxes owed by the particular taxpayer. If a credit is considered to be different than a deduction, because it allows a dollar-for-dollar benefit, then would a 90% credit pass constitutional muster, or a 75% credit, or 50%, as compared to the 44.77% tax benefit currently realized by taxpayers for a federal and Arizona tax deduction? *See* p. 5 *supra*. The difficulty of drawing such a line shows that tax benefits provided to taxpayers must be treated the same without regard to the label, and therefore *Mueller* controls.

Petitioners also attempt to distinguish *Mueller* by pointing out that the Minnesota tax deduction was available to all parents, including those whose children attend public schools, while the Arizona credit is available only for nongovernmental schools. Kotterman Pet. 1, 15-16; Rhodes Pet. 16-19. This distinction is meaningless in Arizona, however, because as a matter of state policy, Arizona residents are not charged tuition. *See* A.R.S. § 15-816.01. The statute could provide for tuition scholarships for public school students, but the provision would

be meaningless because students are already given a free public education. Because the Arizona Legislature has already established a policy of no public school tuition for Arizona residents, the Arizona statute is as neutral as the Minnesota law.[8]

Significantly, the Arizona law includes tuition to any nongovernmental schools, not just sectarian schools. Petitioners admit that 37.9% of Arizona's private schools are nonsectarian. Petition to the Arizona Supreme Court ("Arizona Pet."), Ex. F at 18. Because the law is neutral between religious and nonreligious schools, it neither advances nor inhibits religion. *See Agostini*, 521 U.S. at 231 (state aid is less likely to have the effect of advancing religion "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a non-discriminatory basis.").

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[8] Minnesota also provided its citizens with free elementary and secondary schooling. *See Mueller*, 463 U.S. at 391 (citing Minn. Stat. §§ 120.06, 120.72). The petitioners in *Mueller* argued that because public education was free in Minnesota, the tax deduction primarily benefitted religious institutions. *Id.* at 401. The Court rejected the argument, noting that the parents of public school children could use the deduction for some items and concluding that "the fact that private persons fail in a particular year to claim the tax relief to which they are entitled – under a facially neutral statute – should be of little importance in determining the constitutionality of the statute permitting such relief." *Id.* In Arizona, there is less reason to provide a credit for public schools because, unlike Minnesota, Arizona public schools do not charge tuition for attendance of students in public schools outside the district in which they live. *See* A.R.S. § 15-816.01. Further, Arizona does give a credit for fees paid for extracurricular activities by parents of public school students. *See* A.R.S. § 43-1089.01.

B. *Nyquist* Does Not Require the Invalidation of Legitimate Tax Credits for Charitable Contributions.

Petitioners' reliance on *Nyquist* ignores the facts of that decision and how it was later interpreted in *Mueller*. Because the Arizona School Tuition Organization Tax Credit is a genuine tax credit for charitable contributions, it is not invalid under *Nyquist*.

The New York statute at issue in *Nyquist* provided for direct money grants to nonpublic schools and a form of tax relief for those who failed to qualify for the tuition grant program. This Court noted that the law provided that parents who failed to qualify for the tuition reimbursement could subtract from their adjusted gross income a designated amount for each dependent for whom they paid at least $50 in nonpublic school tuition. *Nyquist*, 413 U.S. at 765. The Court also noted that the amount of the deduction was not dependent upon how much the taxpayer actually paid for nonpublic school tuition. *Id.* at 766. The formula was apparently designed to assure that each family would receive a carefully estimated net benefit, and that the tax benefit would be comparable to, and compatible with, the tuition grant for lower income families. *Id.* The Court concluded that in practical terms there was little difference, for purposes of determining whether such aid had the effect of advancing religion, between the tax benefit and the tuition grant. *Id.*

In *Mueller*, this Court distinguished *Nyquist* as not involving a "genuine tax deduction" because the tax benefits were actually disguised direct grants:

> Indeed, the question whether a program having the elements of a "genuine tax deduction" would be constitutionally acceptable was expressly reserved in *Nyquist*. While the economic consequences of the program in *Nyquist* and that in this case may be difficult to distinguish, we have recognized on other occasions that "the form of the [state's assistance to parochial schools must be examined] for the light that it casts on the substance." The fact that the Minnesota plan embodies a "genuine tax deduction" is thus of some relevance, especially given the traditional rule of deference accorded legislative classifications in tax statutes.

Mueller, 463 U.S. at 396 n. 6 (citations omitted). The Court further noted that "by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject," and concluded that "[w]here . . . aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of State approval,' can be deemed to have been conferred on any particular religion, or on religion generally." *Id.* at 399 (citation omitted).

Similarly, the Arizona tax credit is a genuine tax measure that does not violate the policies underlying the Establishment Clause because allowance of a tax credit for support of educational opportunities cannot be viewed as an endorsement of religion. As the Arizona Supreme Court explained:

> The decision-making process is completely devoid of state intervention or direction and protects against the government "sponsorship, financial support, and active involvement" that

> so concerned the framers of the Establishment Clause. As the *Mueller* Court noted, "[t]he historic purposes of the clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit." 463 U.S. at 400, 103 S.Ct. at 3070. Under the circumstances, we believe that "[n]o reasonable observer is likely to draw from [these facts] an inference that the State itself is endorsing a religious practice or belief."

Kotterman Pet. 14a; Rhodes Pet. A16 (citations omitted).[9]

The Arizona School Tuition Organization Tax Credit is not a disguised tuition grant like that struck down in *Nyquist*. It is a genuine tax credit in that it gives a tax benefit to individual taxpayers who contribute money to a qualifying organization. The school tuition organizations must be 501(c)(3) organizations, and give scholarships and tuition grants to children. In this respect they

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[9] The Arizona Supreme Court also recognized that there is no coercion involved in the tax credit: "This tax credit may provide incentive to donate, but there is no arm twisting here. Those who do not wish to support the school tuition program are not obligated to do so. They are free to take advantage of a variety of other tax benefits, or none at all." Kotterman Pet. 15a; Rhodes Pet. A17. Indeed, Petitioner Rhodes' hypothetical taxpayer with $500 or less of income tax liability could choose from among any of the four dollar-for-dollar credits noted above to reduce his or her tax liability to zero, or the taxpayer could choose to let the State have the money. According to Petitioners, the financial effect of each choice would be the same, but a School Tuition Organization would still only receive a contribution based on a knowing and voluntary choice by the taxpayer.

are no different than countless other charities, foundations, or funds established to receive tax deductible contributions which will benefit religious, charitable, and educational activities. Aid to schools is available only as a result of decisions of individual donors, as well as decisions by individual parents to seek scholarships and send their children to qualifying schools. The law does not require any monitoring or inspection of the schools by the State, or even any reports from the schools. The connection, if any, between the State and the schools is triple removed, with the taxpayer, the tuition organization and the children occupying the space between. The tax law encourages an activity deemed to be in the public interest, that is – voluntary contributions that assist parents seeking to educate their children.

Petitioners also fail to acknowledge that Establishment Clause law has not remained static since the decisions in *Nyquist* in 1973 and *Mueller* in 1983. Two years ago this Court held that its "Establishment Clause law has significantly changed" since the mid-1980s, particularly with regard to the Court's "understanding of the criteria used to assess whether aid to religion has an impermissible effect." *Agostini*, 521 U.S. at 223, 237 (internal quotes omitted). The Court held that it is no longer the rule that "all government aid that directly aids the educational function of religious schools is invalid." *Id.* at 225. Following *Agostini*, a program such as Arizona's, where there is no direct aid but only indirect tax benefits, is on even stronger ground than when *Mueller* was decided. The majority below, thus, properly reached its decision by considering this Court's current understanding of Establishment Clause law to apply correctly the

holdings of *Mueller* and *Nyquist*. Therefore, the Petitions should be denied.

C. The Lower Court Applied a Properly Stated Rule of Law.

Petitioners do not, and cannot, assert that the lower court failed to recognize the law that should properly guide its decision. Indeed, both the majority and dissenting opinions discuss and consider in detail *Mueller* and *Nyquist*, the primary cases relied upon by all Petitioners. Petitioners, although incorrect that the lower court erred, merely disagree with the Arizona Supreme Court as to an application of "a properly stated rule of law." Consequently, the Petitions should also be denied because a "petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Supreme Court Rule 10.

II. THE ARIZONA DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT OR ANY FEDERAL CIRCUIT COURT.

Petitioners do not contend that the decision here conflicts with a decision of another state court of last resort or a decision of a United States Court of Appeals. And, contrary to the assertion of the Respondents who were intervenors below, *see* Statement of Respondents Keegan et al. at 9, there is no conflict between the Arizona Supreme Court's decision and the decision of the Maine Supreme Court in *Bagley v. Raymond School Dep't*, 1999 ME 60, 1999 WL 236464 (Me. Apr. 23, 1999). The

issue in the Maine case involved direct tuition payments to religious schools. The Arizona tax credit is not given to parents, students, or schools, but to taxpayers making voluntary contributions for scholarships and tuition grants. The issues in the two cases are legally and factually distinct, and a decision on the tax credit issue will not resolve the direct aid issue present in the Maine case. Therefore, there is no conflict, and review here is unnecessary.

The tax credit issue is a peculiarly Arizona matter that may never arise in any other state. Indeed, in their Petition to the Arizona Supreme Court, Petitioners recognized that the challenged tax credit was more likely to run afoul of the Arizona Constitution than of the United States Constitution, characterizing the Arizona Constitution as "an independent source of constitutional law, which often 'contains broader and more protective language' than its federal counterpart." Arizona Petition at 7 (citation omitted). Many other states also have state constitutional limitations on aid to private or religious schools that are at least as restrictive as Arizona's.[10] Thus,

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[10] For example, twelve of the fourteen states that Petitioner Rhodes states have tax credit legislation pending, *see* Rhodes Pet. at 22 n.12, have state constitutional restrictions on aid to religion or private schools, or both. *See* ARK. CONST. art. 14, § 2 (no use of public school fund other than for the respective purposes to which it belongs); CONN. CONST. art. 8, § 4 (no diversion of public school funds from support of public schools); DEL. CONST. art. X, §§ 3 and 4 (no funds appropriated or raised for educational purposes shall be used in aid of any sectarian school or for any other purpose than the support of free public schools); HAW. CONST. art. X, § 1 (no public funds appropriated for the support or benefit of any sectarian or

any similar tax credit scheme may be found to be invalid on independent state grounds, rather than based on the federal constitution. Only if such a plan survives a state constitutional challenge, but is stricken under the Establishment Clause, may this Court then be called upon to resolve the conflict. There is no present need to address this unique issue.

III. WHETHER "PUBLIC FUNDS" ARE USED IS NOT AN ISSUE UNDER THE FEDERAL CONSTITUTION.

Petitioner Rhodes presents as a question before the Court whether the income tax revenues paid to School Tuition Organizations by taxpayers are "public funds." Rhodes Pet. i. While this was an issue below for purposes

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private educational institution); ILL. CONST. art X, § 3 (no use of public funds to support any school controlled by a sectarian denomination); IND. CONST. art. 1, § 6 (no money shall be drawn from the treasury for the benefit of any religious institution); KAN. CONST. art. 6, § 6 (no religious sect or sects shall control any part of the public educational funds); MO. CONST. art. IX, § 8 (no use of public funds to support any school controlled by a sectarian denomination); NEB. CONST. art. VII, § 11 (no appropriation of public funds for any school not owned or exclusively controlled by the state, except for special education); ORE. CONST. art. I, § 5 (no money shall be drawn from the treasury for the benefit of any religious institution); TEX. CONST. art. 7, § 5 (no appropriation from school fund for the support of any sectarian school); UTAH CONST. art X, § 9 (no appropriation for the direct support of any school controlled by any religious organization). Based on their arguments below relating to Arizona's constitution, Petitioners must believe that tax credits would be contrary to each of these state constitutional provisions.

of article II, section 12 and article IX, section 10 of the Arizona Constitution, which prohibit the use of "public funds" for various purposes, it is not an issue under the Establishment Clause, which provides that "Congress shall make no law respecting an establishment of religion." Contrary to Petitioner's contention, Rhodes Pet. 7-8, the Arizona Supreme Court did not rest its Establishment Clause ruling on any determination that "public funds" were not used. The "public funds" issue was only one of Arizona state law. The Arizona Supreme Court ruled that the tax credit did not violate the prohibition in the Arizona Constitution against giving public funds to private or religious schools. *See* Kotterman Pet. 19a – 39a; Rhodes Pet. A 21-45. The Arizona court did not, however, attempt or need to define "public funds" in the Establishment Clause portion of its opinion. *See* Kotterman Pet. 4a-19a; Rhodes Pet. A4-A21. It is unnecessary for "public funds" to be defined here, and the issue is not properly before the Court.

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The Arizona School Tuition Organization Tax Credit does not violate the Establishment Clause of the First Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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